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to show why such persons would perforce possess equities superior to schools which educate children today—or, indeed, why the latter should not, as a matter of law, be entitled to the benefits of the principles in question. Appellants attempt to upset the lower court's reasoning by broad statements such as: "[after *Norton v. Shelby County*] retroactivity continued to be accorded to judicial decisions almost without exception", and "Outside this line of authority [cases relating to bonds] the rule of retroactivity was almost invariably honored." (Brief, 21). But with, therefore, supposedly myriad cases to sustain them, the Appellants are able to provide discussion of only two—*Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924) and *United States v. Estate of Donnelly*, 397 U.S. 286 (1970). Under analysis, these two cases do not stand up as cases in point.

*Tidal Oil* held that a judicial decision, upon which a party had relied to its detriment, and which changed the law of property as stated in a different and earlier decision, did not constitute a law impairing the obligation of contracts under Article I, Section 10. Under the facts of *Donnelly*, there was no reliance upon any judicial decision construing a statute. Contrary to Appellants' contention, this case in no way may be read as overruling or limiting this Court's holding in *Chicot County Drainage District v. Baxter State Bank*, *supra*.

**CONCLUSION**

**It is Respectfully Submitted That This Court Should Affirm The Judgment Below.**

**Dated August 21, 1972**

**Respectfully submitted,**

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THE REPORT  
OF THE ARCHDIOCESAN  
ADVISORY COMMITTEE  
ON THE  
FINANCIAL  
CRISIS  
OF  
CATHOLIC  
SCHOOLS  
IN PHILADELPHIA  
AND SURROUNDING COUNTIES

JOHN T. GURASH CHAIRMAN

Philadelphia, 1972

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1972

—  
No. 71-1470  
—

ALTON J. LEMON, ET AL., *Appellants*,

v.

DAVID H. KURTZMAN, ET AL., *Appellees*.

—  
Appeal from the United States District Court for the  
Eastern District of Pennsylvania  
—

—  
BRIEF FOR COMMONWEALTH OF PENNSYLVANIA  
AND FOR APPELLEE SCHOOLS  
—

OPINION BELOW

The Opinion of the three-judge District Court for  
Eastern District of Pennsylvania is not yet re-  
corded.

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

Constitution of the United States, amendment I:

"Congress shall make no law respecting an es-  
tablishment of religion, or prohibiting the free  
exercise thereof ..."

Pennsylvania Nonpublic Elementary and Secondary  
Education Act, June 19, 1968, P.L. —, No. 109, Pa.  
Stat. Ann. Tit. 24 § 5601, *et seq.*

This is printed in Appellants' Jurisdictional Statement, 3 app.

**QUESTIONS PRESENTED**

On November 28, 1969, a three-judge District Court held Act 109 constitutional. Thereafter, the Appellee Schools renewed contracts under that Act whereby the Commonwealth agreed to purchase services from them. At the end of the 1970-1971 school term the Schools had fully rendered those services, thus, by the terms of the statute, becoming entitled to be reimbursed therefor. On June 28, 1971, the Supreme Court reversed the decision of the District Court.

The following questions are presented:

1. Where, in reliance on then existing constitutional standards and decisions of this Court, and upon the District Court's decision, the Appellee Schools, and schools not before the Court, executed statutory contracts with the Commonwealth providing reimbursement for specified services; and where in reliance upon and as required by said contracts, Appellee Schools and other schools not before the Court, incurred substantial obligations and expenses in the expectation of reimbursement, did this Court's decision of June 28, 1971, rendered after full performance of their contracts by the schools and the coming due of the payments under said contracts, require the court below to enjoin those payments?

2. Under the facts and circumstances of this case, did the court below exercise reasonable discretion in refusing to grant the requested injunction against payment of contract claims that ripened prior to June 28, 1971, where the issuance of said injunction would cause severe financial and administrative hardship to the Appellee Schools, to schools not before the court, and to the Commonwealth; and where the denial of

said requested injunction would result in no substantial hardship to the Appellants who seek such injunction?

### STATEMENT OF THE CASE

On June 19, 1968, Act 109, authorizing the Secretary of Education to enter into contractual relationships with nonpublic schools for the purchase and sale of secular educational services, became law. Section 4 of the Act limits these services to the four specific subjects of Mathematics, Modern Foreign Languages, Physical Science and Physical Education. The Act provides that instruction in such courses

“... shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect.” (Sec. 3(3)).

By statutory definition, “actual cost” for which reimbursement may be made is limited exclusively to three items of direct expenses: textbooks, instructional materials, and teachers’ salaries. (Sec. 3(6)). Following the established pattern of governmental purchase of other welfare services, the Act requires payment to be made only *after* services are rendered.

The Commonwealth then created machinery for the administering of the Act, promulgated regulations, convoked an Advisory Board of educators to consult as to the Act’s operation, and commenced entering into contractual relationships with approximately 1181 nonpublic schools throughout the state pursuant to the provisions of the Act.

On July 18, 1968, the Appellants (the Plaintiffs below) announced to the news media that they were challenging the constitutionality of the Act<sup>1</sup>. How-

<sup>1</sup> See *Pittsburgh Post-Gazette*, July 18, 1968, 21.

ever, only on June 3, 1969, a year after the Act had been in operation, did they file their Complaint<sup>3</sup>. Thus the program had already become fully established, Pennsylvania's nonpublic schools having now expended funds, adjusted curriculum and undertaken administrative changes in reliance upon the continuing operation of the Act.

Following the withdrawal by Appellants (Plaintiffs below) of their action against the seven defendant schools as a class action, and their refusal to bring the numerous and different kinds of sectarian and nonsectarian schools into the case<sup>4</sup>, the court below on November 28, 1969, granted the motion of Appellees (Defendants below) to dismiss for failure to state a claim as to the unconstitutionality of Act 109 and held the Act constitutional. See *Lemon v. Kurtzman*, 310 F. Supp. 35 (E.D. Pa. 1969).

After that date, the nonpublic schools formally renewed their contracts with the Commonwealth under Act 109 for the school year 1970-1971. Payments to the schools under these contracts were, by the terms of Section 7(a) of the Act, due commencing on September 1, 1971, as reimbursement for services performed by the schools from September 1, 1970, to the end of the school year in June, 1971.

Pursuant to the contracts in question, the nonpublic schools in Pennsylvania, during the 1970-1971 school year, rendered in excess of five million hours of instruction to Pennsylvania children in the four subject

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<sup>3</sup> See Brief of Appellants, 4.

<sup>4</sup> Appendix, *Lemon v. Kurtzman*, 403 U.S. 602 (1971). (A42, A54, A58-A63).

areas covered by the Act<sup>\*</sup>. They likewise expended substantial sums in administrative costs necessitated by their assumption of the contract obligations.

The said contracts were executed by Appellee Schools in reliance upon the Establishment Clause test theretofore enunciated by the Supreme Court, namely that the statute have a secular legislative purpose and no primary effect that either advances or inhibits religion, as had been most recently confirmed by this Court's decision in *Board of Education v. Allen*, 392 U.S. 236 (1968). That test was applied by the District Court below. *Lemon v. Kurtzman*, 310 F. Supp. 35 (1969).

After the completion of the 1970-1971 school term and full performance by the schools of their contracts, this Court issued its opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), stating that "[T]he cumulative impact of the entire relationship arising under the [Act] . . . involves excessive entanglement between government and religion" (*id.* at 614) and finding such "entanglement" particularly occasioned by the fact that payments under Act 109 were to be made "directly to the church-related school." *Id.* at 621. Hence the Court remanded the case for further proceedings consistent with its opinion.

The court did not adjudicate the question of payment for past completed contracts or preclude such payment. On July 21, 1971, the Commonwealth and the Appellee Schools petitioned the Court for rehear-

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<sup>\*</sup> *Composite of Nonpublic School Claims, Final Statistical Analysis Under the Provisions of Act 109 (1970-1971)*. Office For Aid to Nonpublic Education, Commonwealth of Pennsylvania, July 2, 1971.



ing. The subsequent Order entered for the Court by Mr. Justice Black denied that petition "without prejudice".

In the District Court the Commonwealth and the Appellee Schools filed a Motion praying that the injunction be so framed as to direct the Commonwealth to pay its debts to the schools "for services rendered but yet unpaid for, pursuant to contracts entered into at a time when the Act was presumed valid and had been held valid by this Court." This Motion specifically alleged, in its third paragraph, the following:

"... the schools . . . fully performed their obligations under the contracts by rendering secular educational services and actually expending sums of money for teachers' salaries, textbooks and instructional materials. In performing, under the contracts, the Defendant Schools incurred expenses and debts which they would not otherwise have incurred except in reliance upon the Commonwealth's promise to reimburse them for same." (A 12-A 13).

The Plaintiffs' (Appellants') Answer to that Motion did not deny the aforesaid allegations respecting the reliance of the schools and their making of expenditures based upon such reliance. Instead, it described the contracts as a "fictional contrivance" and asserted the schools' reliance to be unjustified (in Appellants' opinion) on the ground that "the defendants were on notice that the constitutionality of the Act was highly questionable." (A 16).

The District Court, on December 28, 1971, issued an Order enjoining payments "for services performed or costs incurred for any period subsequent to June 28, 1971", thus permitting reimbursement for the

1970-1971 school year. On February 22, 1972, that court, in a unanimous opinion, set forth at length the reasons why it believed such reimbursement to be justified. On the question of justifiable reliance on the part of the schools, the court said:

"There is no doubt that such reliance was justified by the presumption of constitutionality which attached to the Act upon its signing into law, *Philadelphia v. Depuy*, 431 Pa. 276 (1968) and, a fortiori, by the decision of this Court, in the first instance, holding the Act constitutional. There is no dispute that to deny the church-related schools any reimbursement for their services rendered would impose upon them a substantial burden which would be difficult for them to meet. To avoid this hardship, we concluded the funds allocated to reimburse the non-public schools for services rendered in the school year 1970-1971 may be paid." *Lemon v. Kurtzman*, \_\_\_\_ F. Supp. \_\_\_\_ (E.D. Pa., Feb. 22, 1972). (Jurisdictional Statement, 9, 10, app.).

The three-judge court disposed of the Plaintiffs' (Appellants') contention that the contracts were "fictional" with the following reinforcement of the court's conclusions respecting the good-faith reliance of the schools:

"Plaintiffs argue that the term 'contracts', as applied to these transactions, is misleading and that the payment of funds is, in fact, a subsidy. In the first instance, this Court rejected this argument, 310 F. Supp. at 39-40. In its opinion, the Supreme Court apparently accepted this interpretation. 403 U.S. at 610. At any rate, whether the reimbursement constituted payments under the contracts or a subsidy makes no difference in our decision. Nor does it lessen the reliance of the non-public schools on the payments or the subsequent hardship upon

them if the payments are not made. Defendants have raised the issue of the standing of plaintiffs to argue that these transactions did not constitute contracts. In so holding, we need not decide this issue." *Lemon v. Kurtzman*, \_\_\_\_ F. Supp. \_\_\_\_, footnote 6 (E.D. Pa., Feb. 22, 1972). (Jurisdictional Statement, 9 app.).

### SUMMARY OF ARGUMENT

In 1968 the Pennsylvania legislature enacted Act 109 whereby, adopting the purchase of service concept employed in governmental support of health care and welfare work by voluntary (including sectarian)\* agencies, the Commonwealth purchased educational service from non-public (including sectarian) elementary and secondary schools. The purchased instructional service was required to be secular in content, and, in aid of that objective, was statutorily limited to the four subjects of Mathematics, Modern Foreign Languages, Physical Science and Physical Education. As with all purchase of service programs, payment was based, not upon a budget, but upon actual cost. This cost was limited to two items: teacher salaries (for classroom hours logged in the four subjects) and secular textbooks and instructional materials (pertaining solely to the four subjects) having prior state approval.

The state legislature declared this program to be in direct response to a general educational and financial crisis in Pennsylvania in which public and nonpublic education were inextricably linked. One fourth of all school children in the Commonwealth attend nonpublic (including parochial) schools.

Appellants attack the decision below on three grounds: (a) that no equities exist in favor of the

\* *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507 (1956).

schools which would justify the payment to them of the reimbursement earned pursuant to the contracts entered into under the Act (b) that any reimbursement made to the schools would involve the "excessive entanglements" between church-related schools and the state at which the decision in *Lemon v. Kurtzman* was aimed (c) that, even if strong equities exist in favor of the schools, and even if no undue administrative entanglements would result from the reimbursements, the payments are constitutionally barred because of the effort of this Court "to withdraw the issue of parochial school aid from the political arena."

Appellants' extreme position reveals a basic misunderstanding both of the criteria which this Court has developed with respect to the effect of judicial nullification of legislation, and of the plainly worded provisions of Act 109.

Reimbursement to the schools is amply justified on the basis of their unassailable good-faith reliance upon agreements which are true contracts under applicable Pennsylvania law. The lower court was correct in stating that, after such reliance, to deprive them of the consideration which they have honestly earned would work extreme hardship upon them. Furthermore, it would be damaging to basic interests of the Commonwealth at a time of a worsening educational crisis in the major cities, coal regions and other areas of the state.

No "entanglement" in any form of monitoring or inspection of religious schools, or the segregating of their expenses between religious and secular items, can now take place. The classroom instruction, for which the reimbursement for a teacher's salary is owed, long since took place (more than a year ago).

There is nothing left to monitor. The textbooks and instructional materials had to be approved even prior to then. The Superintendent of Public Instruction must legally be presumed to have performed his duty, under the Act, to see that its requirements of secularity were met. The post-audit, under the Act, takes place after the instruction is over and the textbooks have been used. It reviews solely the two accounts of actual cost of (a) teacher salaries and (b) textbooks and instructional materials in the four subjects. The audit does not, by the limits given in the statute, encompass a segregating of expenses of a school into secular and religious categories.

The making of the reimbursements will not undermine the non-"entanglement" policy enunciated in *Lemon*. The present injunction completely satisfies that policy.

Finally, the Appellants' *in terrorem* argument, which says that the earned reimbursements must be denied on the ground that this Court has withdrawn the issue of parochial school aid from the political arena, directly affronts liberties of speech, press, assembly and petition belonging to all citizens. The proposal that *any* legislation may be found to be unconstitutional because *any* group—racial, political or otherwise—campaigns for it or against it is constitutionally obnoxious. But to say that it must be found unconstitutional because *religious* groups campaigned for it or against it, is a direct and malevolent affront to religious liberty. If this proposal were to be adopted by this Court, it would not merely chill religious liberty: it would freeze it.

### ARGUMENT

#### I. REIMBURSEMENT TO THE SCHOOLS OF THE COST OF SERVICES WHICH THEY PROVIDED IN GOOD-FAITH RELIANCE ON CONTRACTS, IS CALLED FOR ON THE BASIS OF EQUITABLE PRINCIPLES.

##### A. A True Contractual Relationship Was Created Between the Commonwealth and the Schools.

Whether the relationship between the Commonwealth and the Schools was founded upon a true contract was not deemed to be controlling by the three-judge court below in the view of the strong equitable factors which exist in favor of the schools.<sup>7</sup> The Commonwealth and the Appellee Schools had stated that position in their arguments before that court. The Appellants, nevertheless, pursue the question as though it were critical to their appeal. Thus it is necessary that it be shown that they are in error.

Under the law of Pennsylvania, which clearly governs here, the contracts are valid. In Act 109 the Pennsylvania General Assembly four times employed the term, "contract". The title of the Act recites authorization of the Superintendent of Public Instruction "to enter into *contracts* to carry out the intent and purposes of this act"; Section 2 (legislative findings and declaration of policy) states that the Commonwealth has the right "to enter into *contracts* for the purchase of needed service"; Section 3 (definitions) says that purchase of service shall be "pursuant to *contract*"; Section 5 (administration) empowers the Superintendent of the Public Instruction of "make *contracts* . . . necessary or convenient to the purchase of secular educational services hereunder." (Emphasis supplied).

<sup>7</sup> See Opinion of that court, February 22, 1972. (Jurisdictional Statement, app. 9-10, Footnote 6).

The deliberate use of this legal term by the law-making body of the Commonwealth cannot be presumed to have careless or accidental (*Treaster v. Union Tp.* 430 Pa. 223, 228 (1968)), nor indeed fraudulent (a "fictional contrivance", in the phrasing of the Appellants). (A 16). The Pennsylvania Statutory Construction Act provides that "Words . . . shall be construed . . . according to their common and approved usage" and that "technical words and such others as have acquired a peculiar and appropriate meaning . . . shall be construed according to such peculiar and appropriate meaning . . ." Act of May 28, 1937, P.L. 1019, art. III, § 33, 46 Pa. Stat. Ann. § 533. Whether "contract" be considered an ordinary word or a technical word, it is clear that, under the aforesaid canon, it cannot be construed to mean "gift", or "subsidy", or "contrivance". See *Commonwealth ex rel. Cartwright v. Cartwright*, 350 Pa. 638, 645 (1944); *Biddle Appeal*, 390 Pa. 460, 466 (1957); *Davis v. Sulcove*, 416 Pa. 138, 143 (1964).<sup>8</sup>

Appellants misconceive both the nature of state contracts and of the requirements of the Act, when they further state that no contract here exists because, so Appellants aver, the schools, under the arrangement, did not have to "increase their enrollment or change their curricula, or do anything else of benefit to the

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<sup>8</sup> For Pennsylvania law respecting consideration to support a binding promise see *Mikos v. Kida*, 314 Pa. 561, 172 A. 101 (1934); *York Metal & Alloys Co. v. Cyclops Steel Co.*, 280 Pa. 585, 124 A. 752 (1924); *Stearns v. Targe*, 34 D. & C. 2d 399, 52 Del Co. 96 (1964). The benefit to the Commonwealth and the detriment to the participating schools was: the Act's requiring a changover to the use of non-sectarian books in the four subjects, the standardized testing requirements for students and the requirements for teacher certification.



state." (Brief, 28) <sup>9</sup>. This Court, to the contrary, stated, as to both Act 109 and the Rhode Island statute considered by it in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

"... the statutes themselves clearly state that they are intended to *enhance the quality of the secular education in all schools* covered by the compulsory attendance law. There is no reason to believe the legislatures meant anything else. . . As in *Allen*, we find nothing here that undermines the state's legislative intent; it must therefore be accorded appropriate deference." *Id.* at 613. (Emphasis supplied).

The legislature knew, and the District Court found (see 310 F. Supp. 35, 39), that, but for the purchase of service program under Act 109, many nonpublic schools in Pennsylvania could not continue to carry their burden of providing education to children in a time of general educational and financial crisis in the state.

If Appellants' argument were to prevail, that no purchase-of-service contract could legally be said to exist between the state and private schools unless the latter were obligated to "increase their enrollment or change their curricula", then all purchase-of-service contracts between the state and voluntary child-care, health care, and care of the aged institutions would be a nullity. The very concept of purchase of service is grounded in the idea that private, voluntary agencies and institutions (prominently including sectarian agencies and institutions) afford invaluable services to people which it is in society's interest to avail itself of, instead of stimulating the further metastasizing of

<sup>9</sup>"Brief" herein refers to Brief of Appellants.



governmental bureaucracy. The purchase contracts are never conceived to depend upon the private agency's *enlarging its intake or changing its offerings*, and the notion that an exception should be made in the case of Act 109 is as without support in practice as it is without support in reason.

Plainly, the schools today hold true contracts with the Commonwealth for the 1970-1971 school year.

**B. The Schools Were Justified in Relying, to Their Detriment on Their Contracts With the Commonwealth.**

Were the schools justified in signing the contracts for the 1970-1971 school year? To answer this, certain background is needed:

At the time the contracts were signed, the Act was in its third year of operation. A huge segment of the total elementary and secondary school population of Pennsylvania was served by nonpublic schools—about 23 per cent. (Act, Sec. 2(2)). Not only in the major metropolitan areas of Philadelphia and Pittsburgh, but also in the coal regions, the capacity of the nonpublic schools to keep going bore an intimate relationship to the increasing money-and-service crisis of Pennsylvania's public schools. Almost 1200 schools, carrying on the serious business of educating Pennsylvania children under the compulsory attendance laws, were long since fully participating in the program. This Court has said of those schools:

“Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious

organizations, largely by the gifts of faithful adherents." *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

Of course there was dependence, not only by these schools, but by the Commonwealth and the general community, upon the program afforded by Act 109. And all three were justified in relying upon the ongoing of the program. In its first year it was unchallenged in the courts. If reliance upon its continuation was justified at the end of its first year of unchallenged operation, such reliance was doubly justified in its second year when, following challenge and full briefing and argument in the court selected by the challengers, Act 109 was declared by that court to be constitutional. When the contracts for the school year 1970-1971 were entered into, therefore, Act 109 was not merely *presumed* constitutional; it had been *judicially determined* to be constitutional.

The three-judge court had decided the case on the basis of *Board of Education v. Allen*, 392 U.S. 238 (1968) and the purpose-and-effect test therein stated (a test which the Supreme Court, in *Lemon v. Kurtzman*, did not find Act 109 to fail to meet). For the Commonwealth to have refused to proceed with contracts for the 1970-1971 school year, would have been violative of its plain duty under the Act. For the schools to have refused to proceed with the contracts, would have been violative of their ethical obligations to their constituent children, parents, and the community. The Commonwealth and the schools were plainly compelled to proceed with the contracts, and, following that, with all of the other filings, approvals and expenditures necessary in preparation for the continuance of the program into school year 1970-1971. Neither

could remotely have considered abandoning the already established and operating program merely on the ground that an appeal had been filed.<sup>10</sup>

The Appellants deny that the schools' reliance was to the detriment of the schools. The court below unanimously stated the opposite. It said that there was "no dispute" that to deny reimbursement for the services rendered would impose on the schools "a substantial burden which it would be difficult for them to meet." (Jurisdictional Statement, 10 app.). The court below likewise pointed out that, in reliance on the contracts, the schools had "adjusted their budgets . . . and performed the services required by them". (Jurisdictional Statement, 9 app.). The court was well justified in this determination. In the Motion Re: Framing of Injunction, submitted by the Commonwealth and the Defendant Schools, the following specific allegation appears:

"In performing, under the contracts, the Defendant Schools incurred expenses and debts which they would not otherwise have incurred except in reliance upon the Commonwealth's promise to reimburse them for same." (A13)

The Answer to Defendants' Motion Re Framing of Injunction did not deny that allegation. (A16-A17). The allegation is thus admitted of record.

Respecting the issue of hardship, Appellants argue in a circle. The court below had said that reimbursement for 1970-1971 could be made because of the equitable factors of, *inter alia*, the hardship which the

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<sup>10</sup> In this day when test-casing has become a way of life to some groups, adding heavy burdens to federal court dockets, it begs belief to insist, as do Appellants, that sovereign states should scrap programs, and the beneficiaries of the programs flee from them, merely because one more pressure group has filed one more test case.

schools would suffer through loss of the earned reimbursement. The Appellants respond to this by saying that there can be no hardship, due to the loss of the reimbursement, because the Court, in *Lemon*, had already "rejected out of hand" the idea that "state aid to parochial schools can be justified because their financial situation is desperate." (Brief of Appellants, 30). This circular argument thus fails entirely to meet the court's equity position respecting hardship. While the financial condition of the schools is not material in determining whether the Act violates the First Amendment, it is plainly of the essence in determination of the equity principle here involved. The "financial desperation" of nonpublic schools may indeed not justify state aid to them, but to say that the loss of a contracted-for, budgeted-for, and earned financial reimbursement of educational costs incurred by *any* educational institution these days is not a hardship to it, is both blind and irresponsible. Unhappily, the hardship is visited not on the nonpublic schools alone but upon the general community and the Commonwealth.<sup>11</sup>

In considering applications for injunctive relief, courts properly weigh the hardship to the party against whom such relief is sought as against that which the seeker of such relief stands to bear. Three individuals and six organizations initiated the challenge to Act 109. The court below held the six organization to have no standing to sue. 310 F. Supp. 35, 41 (1969). The three individuals, Alton J. Lemon, Priscilla Reardon, and Betty J. Worrell, have failed to show how the making of the reimbursement payments to the schools

<sup>11</sup> See Supplement A, the *Gurash Report*, prepared by a nonsectarian committee assessing the interrelationship of the nonpublic school crisis in Philadelphia.

would remotely affect them. This is not a class action.<sup>12</sup> The three individuals have not alleged (nor could they, logically) that non-payment would restore any religious liberty which has been denied them. Indeed, they would not be entitled to one cent of the withheld funds. Their lives and liberties would be totally unaffected. They have failed to demonstrate how they would actually suffer in any manner if the money were paid out or how they would gain in any manner if the money were not paid out. In short, it is difficult to understand the motivation of the Appellants in insisting on the denial of the equities which are so plainly now possessed by the schools. Appellants have, in practical terms, achieved their victory since there has now come to a halt a program of tremendous benefit to the secular education of over a half million children in the Commonwealth. With this they should rest content. They have nothing more to gain by their extreme pursuit of a harsh injunction. In balancing the equities, it is clear that the equities are heavily—indeed exclusively—on the side of the Appellee Schools and the Commonwealth in this action.

**II. THE DECISION OF THE DISTRICT COURT IS SOLIDLY  
FOUNDED ON THE DECISIONS OF THE SUPREME COURT  
RESPECTING THE EFFECT OF JUDICIAL NULLIFICATION  
OF A STATUTE**

As to the reach of a decree which nullifies a statute, this Court has said that there is "no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decisions construing the board language of the Bill of Rights." *Williams v. United States*, 401 U.S. 646, 651 (1971). The Appellants, likewise, state that *Great*

<sup>12</sup> See record in Supreme Court of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (A42, A54).

*Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), coupled with *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924), "... made it clear that the Constitution is neutral on the subject of retroactivity in the abstract; that is, it neither forbids nor compels it." (Brief, 22, footnote 13).

Instead of an absolute rule, the Court has developed three criteria reflected in the following questions:

- (a) What purpose is to be served by the new decree?
- (b) To what extent has there been reliance upon the law as it was prior to that decree?
- (c) What effect will application of the new decree have on the public policy which it seeks to advance?<sup>13</sup>

Under these criteria it is plain that the District Court was correct in refusing to enjoin the making of the earned reimbursement payments to the schools.

<sup>13</sup> Speaking in a context of criminal cases, the Court stated in *Stovall v. Denno*, 388 U.S. 293, 296 (1967): "The criteria guiding resolutions of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards."

This Court in *Linkletter v. Walker*, stating that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective," also pointed out that, in doing so, "no distinction [is] made between civil and criminal litigation." 381 U.S. 618, 627, 628 (1965).

**A. The Purpose To Be Served by This Court's Decision in *Lemon v. Kurtzman*—Prevention of Excessive Entanglement Under Act 109—Has Already Been Realized and Will Not Be Frustrated By the Making of the Reimbursements.**

The Appellants say that reimbursement to the schools for 1970-1971 will require the state to

“... examine into each school's curriculum content, methods of teaching, and segregation of expenses between ‘secular’ and ‘religious’ activities—thereby engaging in precisely the kind of entangling inquiry and surveillance that was explicitly forbidden by this Court. . .” (Brief, 16).

To appreciate the complete inaccuracy of the Appellants' charge, it is necessary to understand that the classroom instruction<sup>14</sup> for which reimbursement is sought, took place in the school year 1970-1971. That school year is long since over. While the schools were bound by contract to exclude from the four subjects “any subject matter expressing religious teaching, or the morals or forms of worship of any sect,”<sup>15</sup> the Commonwealth, in determining a school to be eligible for reimbursement, must be conclusively presumed to have made a determination that such school in no wise violated the statutory and constitutional<sup>16</sup> obligation of secularity of instruction. On what basis this determination was made—whether by classroom surveillance or otherwise—it is legally presumed to have been made.

As to that part of the instructional process which involved textbooks and other instructional materials,

<sup>14</sup> It is limited to the four subjects of Mathematics, Modern Foreign Languages, Physical Science and Physical Education. (Act, Sec. 4).

<sup>15</sup> Act, Section 3(3).

<sup>16</sup> *Board of Education v. Allen*, 392 U.S. 236 (1968).



the Rules and Regulations implementing the Act require specific advance approval of a list of textbooks submitted by the school to the Superintendent of Public Instruction.<sup>17</sup> The classroom instruction in which these approved books were employed took place in the school year, 1970-1971. ~~As~~ with those classes of two years ago, so with the textbooks then employed: the state has long since discharged its function with respect to them.

Finally, Appellants quote this Court's statement in *Lemon*, that "in particular, the [Pennsylvania] government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." (Brief, 16). Again, the Appellants misrepresent the statute and its effect. First, a post-audit power, by its nature, can involve no classroom monitoring, surveillance or teachers, or examination of teaching methods. An audit deals with expenditures, not with teaching plans or books. In terms of Act 109, it is a record of the money which a school expended. It is not a record reviewing tapes or transcripts of classroom proceedings. It is to be noted that the audit is limited to "accounts" pertaining to "the cost of secular educational service." "Secular educational service" is a defined term in the Act (Sec-

<sup>17</sup> Rules and Regulations For Implementing The Pennsylvania Nonpublic Elementary and Secondary Education Act, Sec. 5. This regulation is almost identical with that employed in the New York textbook program upheld by this Court in *Allen*. See Opinion of Counsel No. 181, The University of the State of New York Re: Chapter 320 of the Laws of 1965 [New York] Relative to the Purchase and Loan of Textbooks, as Amended by Chapter 795 of the Laws of 1966.



tion 3(2), (3)) and is limited to the four subjects of Mathematics, Modern Foreign Languages, Physical Science and Physical Education (Section 4). It would be ridiculous to say that, as part of the process of *auditing accounts*, an *Auditor General* would or could undertake a program of classroom monitoring. The Appellants' quotation from *Lemon* respecting the post-audit power is inapposite (a power "to determine which expenditures are religious and which are secular"). By the terms of the Act, the expenditures can be made for solely the cost of "*teachers' salaries, textbooks and instructional materials*" in the four subjects<sup>18</sup> (Section 3 (6)), No discretion whatsoever is left to the post-audit process to determine which of these expenditures are religious and which are secular. Under the very terms of the Act, that determination had to have been *already* made with respect to *all three* items. The determination was made by the Superintendent of Public Instruction. He is empowered to purchase only "secular" educational services, as defined in the Act (and only in the four subjects) (Sec-

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<sup>18</sup> The following is the "audit" provision of the Act:

"Section 7. Reimbursement Procedures.—(a) Requests for reimbursement in payment for the purchase of secular educational service hereunder shall be made on such forms and under such conditions as the Superintendent of Public Instruction shall prescribe. Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it *actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement*. Such accounts shall be subject to audit by the Auditor General. Reimbursement payments shall be made by the Superintendent of Public Instruction in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered." (Emphasis supplied).

tion 4), and it is under his direction that the complete administration of the Act takes place (Section 5). It was his responsibility and legal duty, and not that of the Auditor General, to take whatever steps were necessary to assure that the instruction, the textbooks, and the instructional materials in the four subjects were secular.

The Appellants also say that direct reimbursement payments to the schools would defeat the purpose to be served by the *Lemon* decision. The reference by the Court in *Lemon*, however, to "direct" payments (403 U.S. at 621) was solely in the context of entanglement. The Court had already in its opinion, declined to rule that these direct payments had a primary affect advancing religion. The sole stated reason for its outlawing them was excessive entanglements. As has been seen, no such relationships can possibly arise out of the making of the earned reimbursement payments. Further, had the Court considered direct payments to church-related institutions to be *per se* unconstitutional, it would have so held the grants in *Tilton v. Richardson*, 403 U.S. 672, 679 (1971).

It is clear, therefore, that the purpose to be served by this Court's decision in *Lemon v. Kurtzman*—the prevention of excessive entanglement under Act 109—will not be frustrated by the making of the reimbursement payments.

**B. The Court Below Properly Held That the Schools Had, In Good Faith and Justifiably, Placed a High Degree of Reliance Upon the State's Fulfilling of Its Obligation to Make Reimbursement.**

The facts set forth herein, *supra*, were recognized by the court below as fully establishing a degree of reliance by the schools justifying a ruling that, so far as the reliance factor is concerned, they are entitled to reimbursement. Thus the second of the criteria enunciated by the Court in its decisions respecting the effect of judicial nullification of a statute is plainly met in this case.

**C. Application of *Lemon v. Kurtzman*, So As To Deny to the Schools Reimbursement Which They Have Earned, While Accomplishing Nothing On Behalf of a Public Policy of Non-Entanglement Between Church Schools and the State, Will Bring Severe Hardship Upon the Schools and Do Damage to All Education in Pennsylvania.**

The third criterion calls for an estimation of the effect which application of the new decree will have on the public policy which it seeks to advance. *Lemon v. Kurtzman* held that Act 109 called for excessive entanglements between church schools and the state. The injunction which the lower court has issued has put a stop to any and all such entanglements which could possibly arise under the Act. That injunction, therefore, completely satisfies the public policy which the decision of *Lemon v. Kurtzman* sought to advance.

The Appellants, however, seek to move this Court to adopt an *in terrorem* argument which, when examined, is seen to be a direct attack upon the civil liberties of supporters of God-centered education in our country.

This argument points out that, following the decision by this Court in *Lemon v. Kurtzman*, the following legislation was enacted in Pennsylvania: (a) a program whereby unearmarked payments are made to

parents who have children enrolled in nonpublic schools, Act of August 27, 1971, P.L. \_\_\_\_, No. 92, \_\_\_\_ Pa. Stat. Ann. \_\_\_\_; (b) a program modeled on that approved by this Court in *Allen*, of loaning secular, neutral, nonideological textbooks and instructional materials to children in nonpublic schools, Act of July 12, 1972, P.L. \_\_\_\_, No. 195, \_\_\_\_ Pa. Stat. Ann. \_\_\_\_; (c) a program for the furnishing of secular, neutral, nonideological guidance counselling, speech and hearing, remedial and therapeutic services, etc., to children in nonpublic schools. Act of July 12, 1972, P.L. \_\_\_\_, No. 194, \_\_\_\_ Pa. Stat. Ann. \_\_\_\_.

The Appellants say that this Court should deny the earned reimbursement payments for services rendered more than a year ago under Act 109 because the Pennsylvania General Assembly later enacted these pieces of legislation. When its full malevolent impact is seen, the argument begs belief. It denigrates the state legislature which created these laws. Each of those statutes must be presumed to have been enacted in full recognition of what this Court held both in *Allen* and *Lemon*. Before the Governor signed them into law, they were approved for legality by the Attorney General. None of these statutes contains any feature of direct, entangling aid to church schools which this Court has held to be unlawful.

An even more serious aspect of the Appellants' argument, however, is its implied denial of the rights of petition, speech, press and assembly of those citizens who support religiously affiliated education. The incredible assertion, presented to our highest court of law as a constitutional principle, comes to this: *that even though a statute contains no constitutional infirmity whatsoever, it must nonetheless be declared unconstitu-*

*tional on the extrinsic ground that, if it were upheld, some citizens would (or could, or might) decide to exercise First Amendment rights of speech, press, assembly and petition directed to the enactment of other legislation relating to the same area of concern.*

Merely to state such a proposition—baldly, in its essence and shorn of a context of emotional pejoratives—is to reveal its repressive character. The extremity of this position is magnified when it is recalled that Act 109 was never held to have any effect of advancing religion. The Appellants charge that this Court ventured, in *Lemon*, “to withdraw the issue of parochial school aid from the political arena”—that is to say, that the Court, in effect, told the citizenry of the nation:

“If you dare exercise your political liberties in an effort to secure enactment of a constitutional means to secure public aid to parochial schools (or to parents having children therein, or to such children), and if through use of the democratic processes you win acceptance of such legislation in the public forum and it becomes law, we will strike that law down solely for the reason that some people in the community sought to make a religious issue of the matter, or because we thought that some might.”

The Commonwealth of Pennsylvania and the Appellee Schools utterly reject the notion that anything in American law, tradition or policy discountenances the efforts of any group to exercise manifest political rights. A promise to hold legislation unconstitutional merely because some religious groups want it and some others do not, would not place a merely chilling effect upon First Amendment rights: it would freeze

them. If anything is clear with respect to the history of the Religion Clauses of the First Amendment, it is that they were not intended to shut people up. Nor were they aimed at withdrawing any issue from the political arena.

If Appellants are correct in their rationale, they cannot logically single out "parochial school aid" as the one "religious" issue to be withdrawn from the political arena. If, as they say, *religious division along political lines* is the evil to be avoided, then campaigns *by religious groups* for or against the Prayer Amendment, legislation aimed at winning in or withdrawing from Vietnam, or relating to gambling, humane slaughter, welfare rights, drug abuse, government aid to Israel, or for or against liberalized abortion, Prohibition, trade with South Africa, Sunday Laws, conscientious objection, obscenity, "right to work" laws, etc.—all of which have created or are creating, religious division along political lines, must—if they succeed—result in unconstitutional legislation.

It is thus clear that the application of *Lemon v. Kurtzman*, so as to deny reimbursement to the schools, would have no adverse effect on a public policy aimed at non-entanglement between church schools and the state. The present injunction cuts off, for all the future, the offending interlocking of their administrative machineries. And no public policy exists, or could exist constitutionally, which would compel denial of the 1970-1971 reimbursement under Act 109 merely because other, constitutionally different, legislation was adopted in Pennsylvania or because supporters of God-centered education have dared exercise, in the public forum, First Amendment rights in an effort to see that a portion of the tax revenues to which they



contribute are used as an enabler of voluntarism in the field of education, in schools wherein the state's compulsory attendance law is fully satisfied.

On the other hand, denial of the reimbursement to the schools will injure them severely. Pennsylvania's nonpublic schools have operated at a per pupil cost far below that of the public schools while, at the same time, they have produced generations of educated citizens. The impact of the now foreseeable closings of many nonpublic schools in Pennsylvania will create severe disorder and hardship in many public school districts. Every nonpublic school that can be saved, even temporarily, helps prevent a worsening of the overall educational and financial crisis in a state which, in March, 1971, went bankrupt and which today is sinking under growingly unmanageable social and economic burdens<sup>19</sup>.

The three-judge court was correct in its application, in this case, of the doctrine of the *Great Northern*<sup>20</sup>, *Chicot County*<sup>21</sup>, and *Linkletter*<sup>22</sup> cases. Appellants admit that these cases hold that the presence of strong equities of good-faith reliance and hardship would, if present here, justify an exception to a so-called "retroactive" application of the *Lemon* decision. (Brief 21-23). Appellants, in their discussion of the foregoing cases, attempt to convey the impression that the principles of these cases should somehow be limited to bondholders or the criminally accused; but they fail

<sup>19</sup> See, generally, Supplement A (*Gurash Report*).

<sup>20</sup> *Great Northern R. Co. v. Sunburst Oil Refining Co.*, 287 U.S. 358 (1937).

<sup>21</sup> *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

<sup>22</sup> *Linkletter v. Walker*, 381 U.S. 618 (1965).

**THE  
REPORT OF THE  
ARCHDIOCESAN ADVISORY COMMITTEE  
ON THE  
FINANCIAL CRISIS OF CATHOLIC SCHOOLS  
IN PHILADELPHIA AND SURROUNDING COUNTIES**

**JOHN T. GURASH**  
Chairman

**1972**



## FOREWORD

This report of the Advisory Committee on the Catholic Schools which has been approved by all members, is, we believe, the most comprehensive survey of their problems — and the relationship of their plight to the difficulties facing the public schools — that has ever been made anywhere in the United States.

In large measure this must be credited to the cooperation of John Cardinal Krol, Archbishop of Philadelphia, and his aides, who gave the committee's staff unprecedented access to data of all kinds. These data included not only enrollment and financial records of the Catholic schools, but also statistics on parish finances, on novitiates and seminary applications, and many other related factors.

It took courage and resolution to open such records for examination by an impartial, non-sectarian committee of laymen, and I know that the members of the committee join me in expressing our appreciation of Cardinal Krol's determination to make full disclosure of the facts, in order to help the community to accurately assess the full dimensions of a crisis whose impact will be felt by the community as a whole, and not merely by Catholics.

The committee came into being as a result of a letter from Cardinal Krol to me on July 22, 1971, asking me to select and head such a group. In the ensuing conversations and correspondence, we agreed that an advisory committee of the kind he proposed could best serve the community in three ways:

- By bringing up-to-date and making all-inclusive a study which had been made of the public schools' financial straits, for it is self-evident that a collapse of the Catholic school system would aggravate the public schools' difficulties to an almost unimaginable degree.
- By bringing the up-dated study to the attention of various segments of the community, including civic and government leaders, the labor movement, businessmen, and others.
- By opening a dialogue where Catholic and non-Catholic alike could contribute ideas towards the solution of a problem that the entire community shares.

It was specified, however, that the advisory committee would not be asked to undertake research or submit recommendations relating to governmental aid at any level, to legislative action, or to parish aid, nor would the group engage in fund-raising appeals.

Thirty leading citizens of the Philadelphia area, representing business, labor, government, education, and the community at large, agreed to serve on the advisory committee. This group included men and women of various religious, ethnic, and social groups. It was as true a cross-section of the total community leadership as one could wish.

Under the direction of the committee, a technical staff obtained, analyzed, and interpreted the facts concerning the impact of the Catholic schools on the economic and social development of the Philadelphia metropolitan area, as well as the current financial condition of the Catholic schools and projected trends.

In addition to the records of the Archdiocese and its parishes, the committee's staff also drew upon expert advice, opinion, and factual studies from several outside, independent sources.

This report, which deals solely with the factual circumstances as they exist and are expected to develop in the months and years ahead, will serve as a basis for the discussion of the options which are open to our community in its efforts to cope with the crisis in Catholic and public education today. In the immediate future the committee will present an outline of these options to Cardinal Krol.

As the community dialogue on this problem begins, let us bear in mind that what we are talking about is not really a "Catholic problem" at all, but a dilemma of our total society, and that Americans of every faith — and of none — have a stake in its solution. The education of every child is the concern of every citizen.

When I announced my acceptance of the chairmanship of this committee, I told the press: "I cannot prejudge the work of this committee by speaking in any detail about the future, but I can say this: An America without a strong network of non-public schools would be a nation which had lost one of its great strengths. I do not think this country can afford to let that happen."

After many months of work and deliberation, the committee as a whole shares my conviction. Now we solicit the help of the entire community in determining how our society should confront this challenge to its pluralistic strength.

John T. Gurash  
Chairman

## SOCIAL ASPECTS OF THE PROBLEM

This report from the non-sectarian Catholic School Advisory Committee appointed by Cardinal Krol deals with the facts which the Committee finds and believes to exist with respect to the diocesan high and parish elementary schools in the Archdiocese of Philadelphia, and particularly those schools within the City of Philadelphia.

The Committee has made these findings and estimates based on long studies conducted by experts in the fields of Economics, Finance, and Education, as set forth more fully in the body of the report.

I. This report focuses mainly on the facts concerning the economic and financial aspects of education in the Catholic Schools in the Archdiocese of Philadelphia, and the facts and estimates concerning the tremendous financial impact the closing of Catholic Schools would have upon the finances of the Philadelphia Public School System. However, education encompasses other and broader factors which involve not only our economic life, but also the entire spectrum of social, political, and spiritual values that are part of the fabric of life in a free society.

It is in that area, also, that non-public education makes an enormous contribution.

The teaching of duty, responsibility, hard work, frugality, ethics, and proper conduct are part of America's past and are desirable and important to America's future. President Nixon, in a speech on August 17, 1971, stressed the importance of the non-economic facets of education, when he said:

*"In the homes, churches and schools of this nation, the character of our coming generation is being forged. We must see to it that these children are provided with the moral, spiritual and religious values so necessary to a people in great times. As we see those private and parochial schools, which place such stress on those values, close at the rate of one a day, we must resolve to stop that trend and turn it around. And you can count on my help in doing just that."*

This Committee endorses and supports this statement by the President of the United States.

II. Catholic and other parochial schools are committed to an educational philosophy involving morals, conduct, and spiritual as well as intellectual excellence.

While most non-public school children are in Catholic schools, they are also to be found in schools conducted under Jewish and Protestant auspices. In virtue of the demands made upon them and the services they have provided historically, Catholic and other non-public schools are in fact fulfilling a public need. The Jewish scholar, Will Herberg, said:

*"Parochial schools . . . perform a public function, supplying a large*

of children with an education that is everywhere taken as the equivalent of the education given in public schools."

Methodist Bishop Fred Corson said:

"They (the Catholic schools) have broadened the purposes of parochial education and have associated it more closely to a philosophy of life rather than the perpetuation solely of a sectarian position. They have encouraged a willingness to adjust to meet the changing needs and they have introduced the entire community to the contributions made by private education and the problems involved in a pluralistic society."

6. The American tradition of educational diversity has been a great strength to our educational system and should be preserved.

American society needs and grows on educational diversity. Catholic and other non-public schools offer and provide an important educational alternative to the community.

7. The individual citizen's right to choose the kind of education which he wishes his children to have is an important right and should be preserved.

Catholic schools provide all parents with an opportunity for expressing a freedom of choice about education. This concept of diversity or freedom of choice for parents received strong backing from the United States Chamber of Commerce Task Force Report on American Education, which pointed out that:

"We take this diversity for granted in scholarship, in politics, and in the abundance and variety of the commercial marketplace. Why settle for the single choice in education? . . . We think it desirable that parents have a choice of schools for their children . . . Different schools, none of them perfect, will have different combinations of strengths and weaknesses. Parents . . . should be able to choose to find the combination that best satisfies them and their children."

It is not to be overlooked in this connection is the importance of the right an individual citizen has to select for his children a combination of secular education and religious education.

8. Catholic schools are a stabilizing factor in the life of our urban communities.

The existence of good Catholic schools in the area acts (as do good schools generally) to strengthen a community and as a strong retentive force for the population. The schools provide a focal point for neighborhood identification, community pride, and, consequently, lend social and economic stability. These schools enhance the quality of life in our cities and suburbs. They are an important community asset, attracting and retaining in each community substantial numbers of hard-working financially stable families.

9. The example set by the Catholic schools of efficient and economically

constructed and operated facilities is also important.

The spur of competition is good for all schools — public, parochial, or private — fostering constant evaluation and reevaluation of objectives, performance, use of resources and economy. The existence of Catholic schools provides for other schools another benchmark or standard for evaluating educational effectiveness and other measures of performance.

VII. In addition to the foregoing, the resources committed to supplying Catholic education in the Philadelphia area provide this community with

- a quality education for one out of three children in the City of Philadelphia and comparable numbers in the four surrounding counties.
- an important source of a skilled labor force and an educated citizenry.
- a source of community and business leaders.
- a full range of student activities which provide educational, social and recreational services to the community at large and develop in the students themselves a sense of social responsibility.
- substantial facilities and personnel to undertake the education of minority groups and the poor. This aspect of social contribution of Catholic resources was prominently noted by President Nixon in his Message on Educational Reform, March 3, 1970, in which he comments:

*"They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans."*

These resources exist today and represent potentially a powerful instrument for social awareness and change. The resources so committed should be conserved along with our other national resources.

The community stake—both economic and social—is high. Independent of full acceptance of the benefits claimed or value judgments implied, the Catholic and other non-public schools of the Philadelphia community are a substantial factor to be reckoned with and assessed.

VIII. There exists between the public and parochial school system of Philadelphia a large measure of interdependence, cooperation and interaction.

The importance and significance of the close working relationship between the two systems—and their effects upon each other—were spelled out very clearly by the Philadelphia Board of Education and the Philadelphia Archdiocesan Board of Education. Calling for a joint solution to their common problems together they stressed:

*"The education of the children of Philadelphia depends upon the strength of two great educational systems: the public school system and the parochial school system. Each is essential to the welfare of the city and its children; each is fundamentally dependent upon the other. If one suffers, the other inevitably suffers."*

On the following pages are the facts as to the costs associated with providing the benefits outlined briefly above. At the same time, this report identifies the best estimates the experts employed by this Committee can make as to the huge costs to the Public School System of providing those same or similar services.

—educational and social—should the Catholic schools no longer be able to do so.

This brief reminder of the benefits provided to the community by the Catholic schools provides a fuller context for evaluating the hard facts of the financial crises confronting Catholic schools in the Archdiocese of Philadelphia. The economic impact on the community is clear. The key questions for the community are:

**Are the benefits worth the costs?**

**If so, how can these costs be met, and these benefits retained?**

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## SUMMARY

### Background

In his educational reform message to Congress on March 3, 1970, President Nixon stated:

*"The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment . . . supplementing in an important way the main task of our public system."*

Throughout the country, the Catholic school system constitutes the major element among non-public schools. In the City of Philadelphia, for example, 9 out of 10 children educated in non-public schools attend a Catholic school. Nowhere is the significance of Catholic schools as contributors to the education of young Americans more apparent than in Philadelphia.

The school system of the Archdiocese of Philadelphia is comprised of more than 300 elementary and secondary schools in Philadelphia and its four surrounding counties (Bucks, Chester, Delaware and Montgomery). These schools provide educational services to over 230,000 children — 75 percent of whom are elementary students. In Philadelphia alone, one out of three children is educated in a Catholic school.

While there is general awareness of the high cost of education, only recently has attention focused on the financial crisis confronting Catholic school systems throughout the nation. Several studies, including one being developed by a panel of the President's Commission on School Finance, have been commissioned to determine the scope of these financial problems. Philadelphia Catholic schools also are faced with serious financial problems. What has been lacking is community awareness of the specific dimensions of these problems.

### Purpose

The purpose of this report is to provide the facts about the present and projected financial condition of the Archdiocesan School System. The information developed is intended to:

1. serve as a basis for assessing the magnitude of the financial problem;
2. establish the facts required to promote community awareness;
3. provide the basis needed to formulate and evaluate alternative courses of action which can be recommended to the Archdiocese.

### Major Findings

Our analysis covered key educational and financial data from both parish and school sources. Results of our analysis may be summarized as follows:

- A. There is a deficit now. Analysis of the most recently available data provides new and important insight into the financial condition of parishes and schools in the Archdiocese of Philadelphia. In the fiscal year 1970, all parishes combined operated at a net deficit of \$1.2 million. In addition to deficits ex-

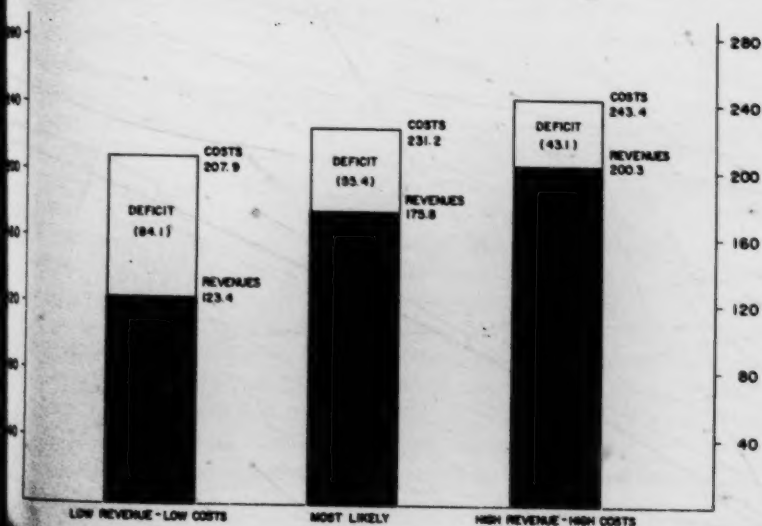


in the parishes, separate accounts for the elementary and the secondary schools showed that elementary schools incurred deficits of \$193 thousand, while high schools spent \$804 thousand more than available revenues. The combined school operation deficit for 1970 was, therefore, \$997 thousand. Thus, the total deficit for 1970 incurred by the three operations — parish churches, elementary schools and diocesan high schools — was \$2.2 million. During fiscal 1971, the deficit in parish operations alone jumped to \$5.1 million, a four-fold increase over 1970. Although complete school financial data is not yet available for 1971, there is every probability that the total deficit will increase, due mainly to the elimination of state aid.

B. Deficits will continue and will grow during the next several years. Projections covering the school years 1972-73 (fiscal '73) to 1974-75 (fiscal '75) indicate that by 1975 the cumulative deficit in the schools will reach \$55.4 million. That projection represents the deficit resulting from a concatenation of most probable conditions. The deficit could be as high as \$84.1 million, or as low as \$43.1 million. Deficits projected for the combined elementary and secondary schools appear graphically in Charts I, II and III, respectively.

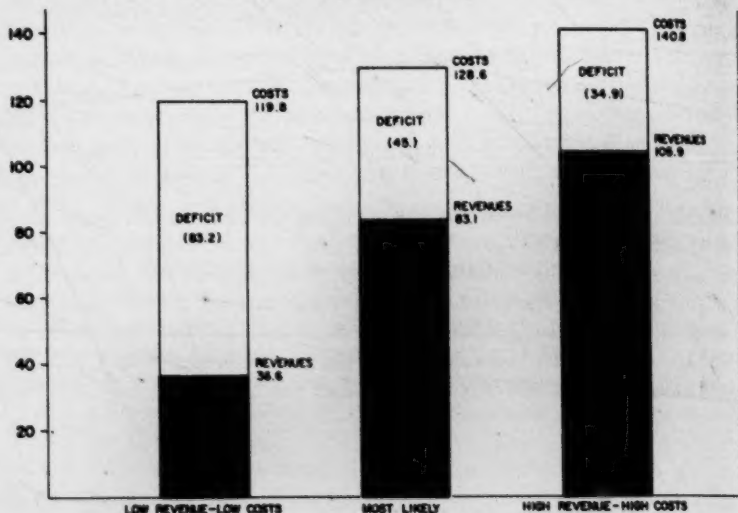
Chart I

ARCHDIOCESE OF PHILADELPHIA — COMBINED ARCHDIOCESE  
PROJECTED CUMULATIVE DEFICIT — FISCAL 1973 THROUGH FISCAL 1975  
(\$ MILLIONS)

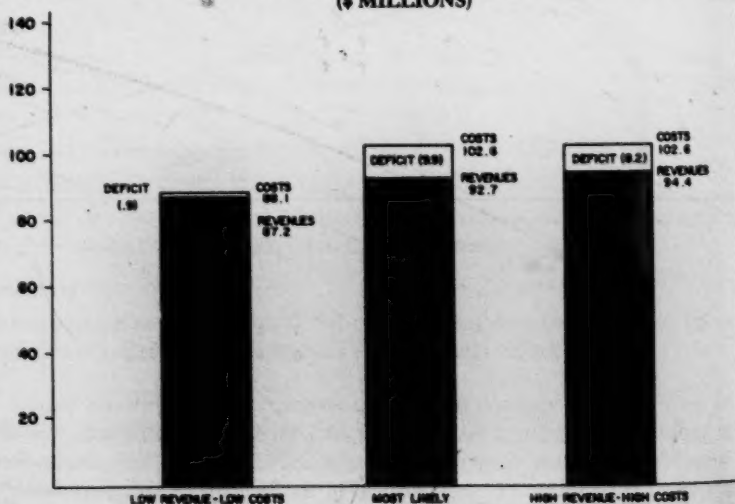




**Chart II**  
**ARCHDIOCESE OF PHILADELPHIA – ELEMENTARY SCHOOL**  
**PROJECTED CUMULATIVE DEFICIT – FISCAL 1973 THROUGH FISCAL 1980**  
**(\$ MILLIONS)**



**Chart III**  
**ARCHDIOCESE OF PHILADELPHIA – SECONDARY SCHOOLS**  
**PROJECTED CUMULATIVE DEFICIT – FISCAL 1973 THROUGH FISCAL 1980**  
**(\$ MILLIONS)**



Underlying the most likely cumulative deficit of \$55.4 million is a \$13.5 million deficit during fiscal '73, which rises to \$19.0 million during fiscal '74 and climbs to \$22.9 million in the school year 1974-75. During these respective years, it is expected that parishes will also be operated at combined cumulative deficits of more than \$35 million, creating a projected total church and school operating deficit of \$90.4 million.

C. Revenues will fail to keep pace with costs. A key factor determining future prospects for Catholic education is, of course, the ability of the church and schools to generate revenues sufficient to keep pace with costs. The cornerstone of the Catholic financial structure is the parishioner contributing through his church. The parish collection is the prime source of revenue funds needed to support the elementary school system, contribute financial support to the secondary schools, and provide for parish needs. Most signs point to a reduced flow of funds from the parishes. Parish revenues, derived mainly from church collections and socials, virtually stopped growing in 1971. Total operating receipts, for the combined parishes of the Archdiocese, increased by less than one percent during fiscal '71. When parish revenues cease to expand, pressures develop in elementary and secondary school budgets. Nearly 46 percent of all parish revenues are used to support education. Funding elementary schools takes 33 percent of total parish revenues; another 13 percent of parish revenues is channeled into the high school system from the parishes. At the elementary school level, parish funds represented 76 percent and 67 percent of the total elementary school budget in the years 1970 and 1971, respectively. Obviously, any diminution of the flow of funds through the parishes must have a substantial direct impact on school budgets. The main source of parish revenues (collections, which produce approximately 60 percent of revenues; and socials and donations, which provide another 16.5 percent of total revenues) are not growth-oriented sources. Experience in recent years indicates slower growth in revenues from the parish is likely to continue over the next four years. If historical contribution rates are adjusted to correct for the effect of inflation, real (or price adjusted) revenues have actually declined in recent years.

Although recent general economic conditions may account for some decline in contribution rates, evidence suggests that resumption of general economic growth may not yield an upward surge in parish revenues. Analysis of the relationships between average family contributions and average family income indicates that there is a less than proportionate increase in contributions associated with changes in income at higher income levels. The analysis reveals that the average contributor will increase his contribution more if, for example, his income increases from \$8,000 to \$9,000, than if his income were to increase from \$15,000 to \$16,000. There is evidence of a diminishing marginal rate of contribution based on income. Thus, future growth of family income may not be adequate to generate the needed growth in revenues to cover burgeoning costs.

Combined elementary and secondary school revenues are expected to reach \$60.3 million in 1975, expanding at a compound annual rate of growth of 2.4 percent from \$56.1 million in 1971-72. These revenues include funds from several sources: parish support and funding, tuitions, student fees and other sources. But projected revenues fall far short of projected costs.

**D. Costs will continue their upward spiral.** School operating costs, especially teacher salaries, have strong upward biases. Several factors reinforce the need to recognize the potential for explosive growth in the costs of maintaining the Catholic school system in Philadelphia. Any list of factors that will push costs up must include:

1. **Rising teacher salaries**—teacher salaries in Philadelphia Catholic schools are below national parochial averages. Additionally, unionization of lay elementary teachers and a movement toward an established level of parity even with Catholic secondary salary scales would exert heavy financial pressure on the school system. Further movement in the direction of parity of both Catholic elementary and secondary salaries to public school salary levels would create an added strain on the financial resources of the school system. Any one, or a combination, of these factors occurring would result in substantial cost increases in the operation of the schools.

2. **Declines in the availability of religious teachers**—inability to provide religious teachers to instruct in the schools would prove extremely costly in Philadelphia. The inability of the school system to avail itself of religious teachers (at relatively low salary costs) may arise because of either a lack of numbers of persons entering the teaching religious orders or by the orders themselves changing their mission. Declining ratios of religious to lay teachers translate directly into significantly higher costs — often a doubling of teacher salary costs. The availability in Philadelphia of a few large religious orders committed to teaching is both an advantage and a disadvantage: an advantage in that they lend an element of stability to costs; a disadvantage in that a decision on the part of any one order to change its mission would have a huge impact on salary costs and be a major destabilizing force. Presently, there are no indications of major shifts occurring in the missions of the large religious orders which support education in Philadelphia. However, a declining religious/lay teacher mix can be anticipated, especially in the high schools. As a result, total teaching costs will accelerate more rapidly than might normally be expected.

3. **Improving (declining) student/teacher ratios lead to higher costs** — student/teacher ratios represent one observable variable that may, rightly or wrongly, be interpreted as a measure of quality. It may serve thus as a measure of perceived quality. Further improvement in the student/teacher ratio in Catholic schools and the concomitant increased cost pressures associated with the reductions are anticipated.

Despite all these pressures, costs in the Catholic schools will remain substantially below the public school system when measured on the basis of cost

per student. To illustrate the gap, the cost per student in Archdiocesan schools projected for the year 1975 is \$478 per student. Contrast this with the current cost (1971-72) of \$1,027 per student in Philadelphia public schools which was estimated by the Federal Reserve Bank of Philadelphia.

**E. Not all schools are operating in the red.** As indicated by analysis of individual school operating statements, there are many schools which are not experiencing deficits currently. Although there is a substantial deficit overall, resulting from the fact that costs are rising at rates approximately three times as fast as revenues, this deficit is not distributed proportionately or evenly over all the schools.

**F. Catholic school enrollments declined in the last several years.** Enrollment declines are projected to continue through 1975 and will add substantially, on balance, to the operating costs of the school districts in Philadelphia and surrounding counties. The net additional cost depends upon projected rates of transfer from the Catholic to the public schools and the effect transfers will have on the amount of aid provided by the state. The cumulative impact over the three year projection period, assuming the rate of transfer implied in the basic forecast (5.7 percent compound annual rate), involves net additional costs in Philadelphia of \$20.9 to \$29.8 million. Additional costs for the four-county suburban area would be \$24.4 million.

If the Catholic schools were to close down at the end of this year (1971-72), and all students were shifted to the public schools, the cumulative additional costs to 1975 would be: Philadelphia — \$378.8 to \$471.2 million; in the four-county surrounding area, the cost would be \$274.8 million. Closing down all schools in the Catholic Archdiocese, therefore, would add an additional \$653.6 to \$746.0 million in total to operating costs over the next three years in the Philadelphia five county area.

Assuming a longer-term closing pattern, 10 percent per year transfer, additional costs to the public school system in the time period 1972-73 to 1974-75 would be between \$140.8 and \$157.5 million. This amount is net of state aid, that is, the additional costs have been adjusted to reflect the fact that transfer of students may generate additional state-aid money for the receiving school districts.

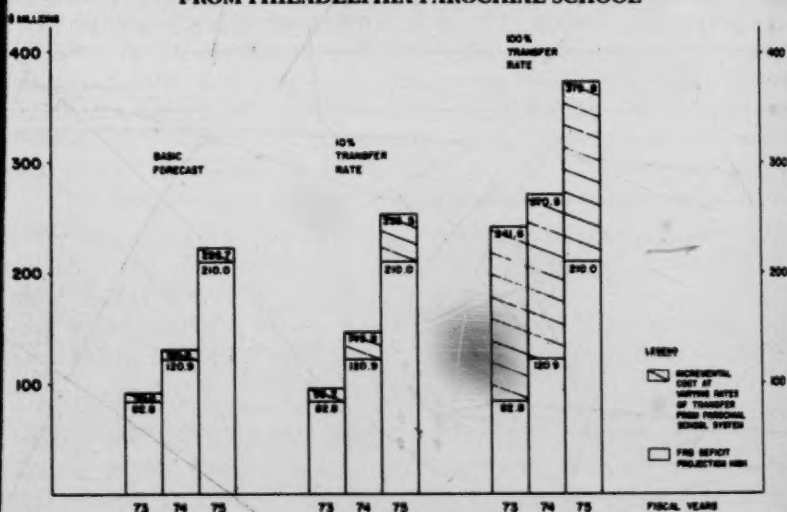
Transfer of students from Catholic to public schools may have a beneficial effect on the financial status of the public schools in that state aid may increase. Within the mechanics of the state-aid ratio, it is possible for the state-aid ratio to rise, yielding higher state aid for not only the additional students but for the total receiving student body as well. But full benefits of transfer-induced state aid are not accrued until three years after the transfers occur. Thus, for example, if the Catholic schools were to close in '72, the public schools would receive no additional state aid in 1972-73, only a partial increase in aid in 1973-74, and the full impact in 1974-75 because of the manner in which state aid is calculated.

Comparison of the cost impact of various assumed rates of student transfer

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on projected public school deficits is revealing. Shifts of enrollment to public schools in Philadelphia may add between \$8.1 to \$12.7 million to the public school deficits projected by the Federal Reserve Bank of Philadelphia, if the Basic Forecast proves accurate. Higher rates of transfer will involve, of course, higher additional costs. Immediate closing of Catholic schools (at the end of the 1971-72 school year) would add \$158.0 to \$162.8 million per year to the public school deficit projected by the Federal Reserve Bank of Philadelphia. A visual comparison of the effects of different assumed rates of transfer on costs is provided in Chart IV.

**Chart IV**  
**COMPARISON OF THE COST IMPACT ON PROJECTED PUBLIC**  
**SCHOOL DEFICITS OF ALTERNATE RATES OF TRANSFER**  
**FROM PHILADELPHIA PAROCHIAL SCHOOL**



G. Tuitions may provide a prime source of additional revenue to schools in the Archdiocese if, in fact, the Catholic community of Philadelphia continues to desire a viable parochial system. There is no evidence of a strong relationship between changes in tuitions (or student fees as proxy tuitions) and declines in enrollment. To the contrary, evidence to date, and at the levels of tuitions now charged, seems to indicate that the demand for Catholic school education is insensitive to current tuition levels—which is not to say that future demand may not be. The recent increase in high school tuitions in the Archdiocese from \$130 per year to \$300 per year is outside the range of any prior experience here — real or statistical. It is too early to determine the full impact of that price rise on enrollments, but so far the effect appears minimal.



evidence, however, in the City of Philadelphia that direct charges (contributions or student fees) in elementary schools are being paid for by an approximately equal reduction in church collections. This means that total support of the parish church-school complex is not likely to change level significantly — rather, parents will redistribute their giving, channeling funds directly into the school budget, by-passing the collection plate.

H. Management information processes and systems are inadequate. There is need for development of necessary information and systems for management analysis and control. Presently, ability to cope with the assessment of problems in a rapidly changing financial situation is limited. High levels of demand for sound financial and other key information are likely to be made upon the Archdiocese as the dynamics of the current financial crises unfold. Hard choices are ahead and they require hard information to manage either controlled balanced growth or decline. The current crisis does not appear to have reached the all or nothing stage. There are options to explore.

#### Perspective

The financial crisis pressing on the Archdiocesan schools, supporting parishes, and parishioners, is typical, in many ways, of the problem facing dioceses throughout the United States. In some places, the stage of the problem is more advanced — the communities involved have made their choice of how to solve the problem. Other communities are barely perceiving the existence of the problem. In Philadelphia, the problem is here and now. The time for learning the facts and making the choices is now. For the Catholic community, the time has always been now. There is, however, a new factor — a growing community awareness of the financial crisis facing non-public education, most significantly Catholic schools.

Many proposals for aid are now being discussed at the federal and state levels. There is, for example, The President's Commission on School Finances, including "The Panel on Non-Public Education." In Pennsylvania, there is the Mullen legislation for school aid. Legal and constitutional questions are by no means settled. There is considerable discussion about methods to finance education generally — tax credits, value-added taxes, and non-property tax bases. Many solutions have been proposed to deal with the problem facing Catholic education, and the sheer economics of education range from closing down all Catholic schools immediately, to limited consolidation or other forms of managed decline, to constructive cooperative programs between Catholic and public school officials. These programs include such cooperative efforts as shared-time, dual enrollment, programs or released time for religious education.

#### Summary

This Committee now has with this report:

The facts necessary to analyze and assess the financial crisis confronting the Archdiocese of Philadelphia school system.



2. A data base to determine and evaluate alternative courses of action and recommendation to the Archbishop of Philadelphia.

3. Information required to assess the impact of the financial problems of the Archdiocesan school system on the Philadelphia community and local public finance.

What is not available is an in-depth understanding of the attitudes of the Philadelphia area Catholic community. Attitudes reported from other parts of the country may or may not be representative of the attitudes of the Philadelphia community. To fill that gap and provide the correct perspective, a systematic program aimed at determining the basic attitudes of the Catholic community in the Archdiocese of Philadelphia must be pursued.

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